Office Supreme Court, U.S.
FILED
SEP 29 1900
JAMES H. MCKENNEY
Clerk

No. 355.

Br. of Critz & Beckett for D. in E.

Filed Sept. 29, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 355.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

WIRT ADAMS, STATE REVENUE AGENT.

MOTIONS TO DISMISS OR AFFIRM, WITH NOTICE, AND STATEMENT AND BRIEF FOR DEFENDANT IN ERROR IN SUPPORT OF MOTIONS.

F. A. CRITZ,
R. C. BECKETT,
Attorneys for Defendant in Error.

(17,840.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 9-18-1900

IN THE

Supreme Court of the United States.

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No. 355.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

WIRT ADAMS, STATE REVENUE AGENT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

MOTIONS TO DISMISS OR AFFIRM.

Comes the defendant in error and moves this honorable court to dismiss the writ of error because this court has no jurisdiction, or to affirm the judgment, it being manifest that even if this court has jurisdiction the said writ of error was taken for delay only, and the questions on which jurisdiction depend are so frivolous as not to need further argument.

F. A. CRITZ,

R. C. BECKETT,

Attorneys for said Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1900.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., *Plaintiffs in Error*,
vs.
WIRT ADAMS, *State Revenue Agent, Defendant in Error.*
No. 355.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

NOTICE.

To Mr. EDWARD MAYES,
Attorney of Record for Plaintiffs in Error in the Above-entitled Cause:

You are hereby notified that the defendant in error in the above-entitled cause will, on Monday, the 15th day of October, 1900, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the court the motions to dismiss or affirm and brief of the argument thereon, both hereto attached.

F. A. CRITZ,
R. C. BECKETT,
Attorneys for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1900.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., *Plaintiffs in Error*,
vs.
WIRT ADAMS, *State Revenue Agent, Defendant in Error.*
No. 355.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

AFFIDAVIT OF SERVICE.

Before me, L. B. Moseley, clerk of the circuit court of the United States for the southern district of Mississippi, at my office, at Jackson, in said district, this day personally appeared the above-named defendant in error, Wirt Adams, who, being by me duly sworn, deposes and says that on this day he delivered in person to Mr. Edward Mayes, attorney of record for the above-named plaintiffs in error, a true copy of the attached motions, notice, and brief of the argument.

Appellee.

Sworn to and subscribed before me this the — day of September, A. D. 1900.

Clerk.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1900.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL., *Plaintiffs in Error*,
vs.
WIRT ADAMS, *State Revenue Agent, Defendant in Error.*
No. 355.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This is one of the Mississippi tax suits. It is for taxes for the year 1898. The declaration was filed April 25, 1899. It is against the Yazoo and Mississippi Valley Railroad Company, a domestic corporation, and the Illinois Central Railroad Company, a foreign corporation, jointly, for taxes on the railroad and property of the Louisville, New Orleans, and Texas Railway Company, which on or about October 24, 1892, became the property of the defendants and for the taxes on which they are liable.

Record, pp. 2 and 5.

At the appearance term the defendants filed a joint petition to remove the cause into the circuit court of the United States for the southern district of Mississippi, on the ground that the declaration on its face raised a Federal question, which petition was denied.

Record, pp. 10 and 20.

The defendants also filed a joint plea setting up a claim to exemption under the charter of said former Louisville, New Orleans and Texas Railway Company, which for 25 years from March 3, 1882, appropriated all taxes to its construction debts, with a proviso that this appropriation should cease when the profits were sufficient to enable it to declare and pay an annual dividend of 8 per cent. upon the capital stock over and above the payment of its debts and liabilities, but this plea did not allege that the railroad was built under this charter, nor that the profits had not been sufficient to pay the dividend, and it was demurred to for these reasons.

Record, pp. 20, 29, 30.

The defendants then, under leave to answer over, filed two pleas, of which the first, called the amended or second plea, rectified the two foregoing omissions and set up that this exemption was an irrepealable contract of appropriation of the taxes and protected by the contract clause, or section 10 of article 1, of the Constitution of the United States, and that this suit is also in violation of the fourteenth amendment.

Record, p. 31.

The other plea, called the third plea, sets up the record and decision in what is known as the Lambert case, reported in 70 Miss. R., page 779 *et sequitur*, as *res adjudicata*, and claims that the contrary decision of June 20, 1898, in the case of Adams, State revenue agent, *vs.* The Yazoo and Mississippi Valley Railroad Company is violative of the contract clause and of the fourteenth amendment aforesaid.

Record, p. 34.

To said second plea the plaintiff filed six replications, substantially as follows:

1st. A denial that the railroad was built under the charter.

2d. A denial that it had not been able to pay the dividend.

3d. A denial that the taxes had in fact been appropriated or paid on construction debts.

4th. Novation of construction debts by bonds of the Illinois Central Railroad Company.

5th. Sets up the decisions of June 20, 1898, and February 20, 1899, in the main case, for taxes of 1892–1895, inclusive, as *res adjudicata*.

6th. Sets up the action and decision of the Mississippi railroad commission in making the assessment, after hearing and overruling the objections of the defendants, as *res adjudicata*.

Record, pp. 181–183.

The first three replications were special traverses of particular, essential matters alleged in the plea, and concluded to the country.

The defendants took issue on the fourth and demurred to the fifth and sixth replications, which demurrers were overruled.

Record, pp. 189, 190, 191, 223.

The plaintiff counter-pleaded the third plea with a replication, setting up the said decisions of June 20, 1898, and February 20, 1899, as *res adjudicata* against said Lambert case, because it was the later decision, the parties and property were different, and because said Lambert case was neither pleaded nor offered in evidence in said later case.

See stipulation correcting record.

A demurrer to this replication was overruled.

Record, p. 223.

Then, to said fifth replication to said second plea and said replication to said third plea the defendants filed a rejoinder, setting up that a writ of error, with supersedeas, from the Supreme Court of the United States was granted in March, 1899, from the judgment in which said decisions of June 20, 1898, and February 20, 1899, were rendered, which was still pending and undetermined.

Record, p. 196.

To said fifth replication the defendants also filed a further rejoinder, setting up said Lambert case as *res adjudicata*, and claiming that the overruling of the same in said decisions of June 20, 1898, and February 20, 1899, was a violation of the contract clause, and also of the fourteenth amendment of the Constitution of the United States.

Record, p. 192.

To said sixth replication, setting up the decision of the railroad commission as *res adjudicata*, the defendants filed two rejoinders, the first answering *nul tiel record*, and the second denying the jurisdiction of the commission to decide the question of exemption, and averring that a conclusive adjudication by it, as claimed, would violate the contract clause and fourteenth amendment aforesaid.

Record, pp. 194, 195.

In order to make and determine this rejoinder of *nul tiel record* as a question of law instead of one of fact, a written agreement was filed as follows:

"In this cause it is agreed that the charters, records of this court, and of the supreme court, and of the Mississippi railroad commission and State railroad assessors, referred to in the 2nd and 3rd pleas, and in the 5th and 6th replications to the 2nd plea, and replication to the 3rd plea, and rejoinders to said replications may be introduced on the hearing of the demurrers, and are considered as actually filed as part

of the pleadings, and on any appeal or writ of error shall be copied as part of said pleadings."

Record, p. 198, as corrected by stipulation.

In making up the supreme court record, instead of copying the proceedings before the railroad commission in full, a written agreement was filed as to what they would show.

Record, p. 226.

The plaintiff demurred to all these rejoinders.

Record, pp. 221, 222.

These demurrers were all sustained, and the defendants declining to plead further, a judgment *nil dicit* was rendered against them.

Record, p. 223.

An appeal was taken to the State supreme court, which, in affirming this judgment, delivered a written opinion, in which it held that:

"It is sufficient to say that all the defenses sought to be availed of by the defendants rest upon and must fall with their pleas. We are earnestly urged in behalf of appellants to overrule the case of Adams *vs.* Y. & M. V. R. R. Co., which denies to them the exemption set out in these pleas, and to re-establish the Lambert case. Careful reconsideration of the Lambert case has strengthened rather than shaken our conviction as to its unsoundness, in so far as it held that the exemption in question, if it then existed, passed to the consolidated company. * * * No *res adjudicata* as to the exemption here claimed arose out of the Lambert case. As to this and the other questions above mentioned, we are content with the reasoning of the opinion in the main case. The various demurrers should have been extended back to the pleas and sustained. * * * The judgment however arrived at was right and must be affirmed."

Record, pp. 231, 232.

From said judgment of affirmance a writ of error was granted from this court, signed by the chief justice of the Mississippi supreme court, to which he attached a certificate that the Constitution of the United States was involved, "the said court holding that the act of July 21st, 1870, and March 3rd, 1882 (the exemption clause or section in the charter of the Louisville, New Orleans & Texas Railway Company), did not create any contract and was a special exemption from taxation, which could not, if it had ever existed, have been maintained after section 180 of the constitution of 1890 cut it off by virtue of the consolidation thereafter made in October, 1892."

Record, p. 234.

There is no assignment of error on the refusal to remove to the Federal court.

Record, pp. 241, 243.

The foregoing opinion of the court was delivered in and applied to two cases, this one and another, the latter involving the taxes for the same year, but on property formerly belonging to the Natchez, Jackson and Columbus Railroad Company, and the part of the opinion referring to the repeal of the exemption by Code of 1880 and not being restored by the act of 1884 refers to that case alone, as the charter in this case was only granted in 1882. The other case is No. 356 in this court, where the same opinion appears on pages 208, 209.

POINTS INVOLVED.

First.

Whether the decision in the opinion appearing in the printed record on page 231, that "careful reconsideration of the Lambert case has strengthened rather than shaken our conviction as to its unsoundness, in so far as it held that the exemption in question, if it then existed, passed to the consolidated company," and "as to this * * * we are content with the reasoning of the opinion in the main case," raises any Federal question.

Second.

Whether the decision in said opinion that "no *res adjudicata* as to the exemption here claimed arose out of the Lambert case. As to this * * * we are content with the reasoning of the opinion in the main case," raises any Federal question.

Third.

If either of said decisions raises a Federal question, and so gives this court jurisdiction, then is it not the duty of this court to sustain the judgment of the court below, if it can be done, on the decisions of the circuit court in preference to those of the supreme court, the one involving only non-Federal and the other Federal questions?

Fourth.

If said first decision of the supreme court raises a Federal question, and this court feels obliged to decide it, then was it not correctly decided?

Fifth.

If said second decision of the supreme court raises a Federal question, and this court feels bound to decide it, then was it not correctly decided by the supreme court?

BRIEF.

First Point.

That the exemption in question, if it ever existed, did not pass to the company formed by the consolidation of October 24, 1892, by which the present defendant, Yazoo and Mississippi Valley Railroad Company, came into existence.

"As to this," says the court, "we are content with the reasoning of the opinion in the main case."

That opinion is found in the record in this court in a case of the same style, being file No. 17341, No. 756 of the October term, 1898, No. 244 of the October term, 1899, and No. 35 of the October term, 1900. It is in the printed record in that cause on pages 638 *et sequitur*. The part concerning the consolidation and above referred to is on pages 638–656.

In that opinion is discussed and decided:

1st. That the charters of the constituent companies did not authorize a merger, but only a consolidation.

See pages 638–643.

2d. "Turning now from the legislative purpose, let us see what was actually done in pursuance of this power to consolidate," and it is then decided on the facts that the things actually done formed a new company and not a merger of one into another.

See pages 643–648.

3d. Then that section 180 of the constitution of 1890 prevented any exemption from passing into this new company.

See pages 648–650.

4th. That a new company having been created by the consolidation, no exemption passed into it, irrespective of what would have been the effect on it of said section 180.

See pages 650–656.

Now, under the above first and third findings and under some circumstances not present in this case a Federal question might be presented, the first finding being a question of law that the charter contract did not authorize a merger, but only a consolidation, and the third being also a finding of law that the exemption was cut off in the act of consolidation by section 180 of the constitution of 1890.

But we contend that neither the second finding nor a union of the second and fourth present any Federal question, as the second is a finding of fact expressly worked out on conflicting evidence, and this court has no jurisdiction to review findings of fact.

Egan *vs.* Hart, 165 U. S., 188.
Keokuk Bridge Co. *vs.* Illinois, 175 U. S., 643–647.
Telluride Co. *vs.* Rio Grande Co., 175 U. S., 631, 632.
L. & N. R. R. Co. *vs.* Schmidt, 177 U. S., 236, 237.

And the fourth finding, *that because it was a new company* no exemption passed into it, follows as a natural and necessary corollary from general and well-settled principles of law, enunciated and fixed before the consolidation took place, and therefore not justifying Federal interference or interpretation as such.

And this court has settled the rule to be that where a decision is based on two grounds—one Federal and the other non-Federal—no distinctively Federal question is raised in the sense of the Constitution and laws of the United States.

Hence we claim that the above first finding in the case at bar that the exemption, if it then existed, did not pass into the consolidation, being based on the former decision to that effect in the main case, and this in turn being on its face based on two sets of distinct and independent findings, one of which at least is non-Federal, presents no Federal question within the rulings of this court, and that this court has and can acquire no jurisdiction by reason of that decision.

See our brief in main case, No. 244, Oct. term, 1899, p. 36.

Moran *vs.* Horsky, 178 U. S., 205, 208–215.

Pittsburgh, &c., *vs.* Cleveland, &c., 178 U. S., 270, 279, 280.

But if this court should differ with us on this point and hold that said second and fourth findings cannot be considered as a finding of facts alone, but that all four of said findings must be taken together and considered as a construction that a merger was not authorized by the charters of the Louisville, New Orleans and Texas Railway Company and original Yazoo and Mississippi Valley Railroad Company, both passed in the year 1882, but only a consolidation, and that the constitution of 1890 prevented any exemption from passing into this consolidation made in October, 1892, thus presenting the question as to whether section 180 of the constitution impaired the contractual powers of consolidation contained in the charters, then we still insist that no Federal question is presented, for the reason that both these charters were granted and accepted in 1882, after and under a construction in the case of Mississippi Mills *vs.* Cook, 56 Miss. R., 40, known as the Mississippi Mills case, in which section 13 of article 12 of the constitution of December 1, 1869, that "the property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals," was construed to mean that the legislature could not grant irrepealable exemptions, but that all exemptions from taxa-

tion were repealable, the said decision being rendered in the year 1878.

Opposite counsel insist that theirs is not an exemption, but an irrepealable appropriation of taxes to certain defined objects. However plausible this might have been, or might be, if urged as an original proposition, it is not available to the defendants in this particular case, because their charters were granted and accepted in 1882 and 1884 and the Mississippi Mills case was decided in 1878. There are some distinctions between the two cases, as pointed out by the Supreme Court in the opinion in the main case, as that in the Mississippi Mills case there was a general equal and uniform exemption to all mills thereafter built of a certain class, and the exemption was not made irrepealable, both of which distinctions, the court holds in the main case, differentiates it from the Mississippi Mills case and renders the exemption in controversy void *ab initio*.

Opinion in file No. 17341, pp. 660 and 660–671.

Leaving out of view those two important distinctions which are not mentioned or discussed in the case at bar, and which are to the irreparable disadvantage of the defendants, we find that otherwise the charters in the two cases are substantially alike. In order that there may be no mistake as to this, we will here copy the material part of each, and thus place them in juxtaposition so that they can be conveniently and readily compared:

ACT OF 1872.

MISSISSIPPI MILLS *vs.* COOK, 56 Miss., p. 42.

"AN ACT to encourage the introduction of machinery and the establishment of factories in the State of Mississippi.

"SECTION 1. *Be it enacted by the legislature of the State of Mississippi*, That in consideration of the construction of factories, and the introduction of machinery for the purposes of erecting, furnishing, and carrying on factories in this State,

for the manufacture of cotton and woolen goods, or yarns, or fabrics composed of those or any other materials, and for the making of all kinds of machinery and implements of husbandry necessary for the cultivation of the soil, and to manufacture all other articles or things of whatsoever character or description, not inconsistent with the laws and constitution of this State, or of the United States, and of the great benefit which the State will receive in the development of its manufacturing resources by means of said factories, and the large and increased amounts of machinery and capital that will, by this liberal-spirited policy, be invited to the State, thus giving employment to and supplying the wants of thousands of our people, and also the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation on the people, the State hereby agrees with any and all manufacturing companies in this State, whose capital stock shall not be less than ten thousand dollars paid in, not in operation before the passage of this act, that all taxes to which said company or companies shall be subject for the period of ten years are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which any of said companies may have incurred in the construction of factories, or the purchase of machinery, or paying debts incurred by any of said companies in constructing or purchasing the same; and it shall be the duty of the tax collectors in every county, in each and every year, for the period of ten years, to give to each of said companies a receipt in full for the amount of all said taxes due, upon receiving from each of said companies an affidavit, made by the president or treasurer of each of said companies, that the amount of said taxes have actually, and in good faith been paid and applied by each of said companies during the year, in payment of debts incurred, or money borrowed, as aforesaid; and which receipt, so given, shall be in full of all taxes, county, State or municipal, to which said companies shall be subject; provided, that whenever the profits of any of said companies shall enable it to declare and pay to its stockholders an annual dividend of four per cent. upon its capital stock, over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease towards such company or companies declaring said dividends, and said taxes shall be paid by such companies

declaring such dividends, to the tax collector, to be by him paid over as required by law."

21st Section of Charter of Mobile & Northwestern Railroad Company, the Charter in Controversy.

Record, pp. 31, 32.

"Sec. 21. *Be it enacted*, That in consideration of the construction of the railroads herein provided for, and of the great benefit which the State will receive in the development of its agricultural resources, by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional burdensome taxation upon the people, the State hereby agrees with said company, (and which agreement is irrepealable) that all taxes to which said company shall be subject for the period of thirty years, are hereby appropriated and set apart and shall be applied to the payment of debts and liabilities, which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands, or otherwise, to be used in constructing the same; and it shall be the duty of the tax collector in every county in each and every year to give to said company a receipt in full for the amount of said taxes, upon receiving from said company an affidavit made by the president or cashier of said company, that the amount of said taxes have actually and in good faith been paid and appled by said company, during the year, in the payments of debts incurred, or money borrowed, as aforesaid, and which receipt so given shall be in full of all taxes, county, State, and municipal, to which said company shall be subject: *Provided, however*, That whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock, over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said company to the tax collector to be by him paid over as required by law."

In another case opposite counsel say that it would be funny if in oral argument we should take the position that the Mississippi Mills case was still in force.

It will be noted that the State supreme court in the main case does not overrule the Mississippi Mills case IN TOTO. After making the above distinctions as to the difference in the facts of the two cases, and showing that the opinion was broader than the facts in that case justified, the court only overruled it so far as the opinion overlapped the facts. It expressly says:

"In no other respect do we interfere with the decision in that case. * * * The case before us most emphatically does not present a claim to exemption under a charter identical with the charter in The Mississippi Mills *vs.* Cook, nor the case of any corporation which has acted on the faith of a decision construing a charter identical with the charter in the case of Mississippi Mills *vs.* Cook, and which might thus be said to constitute, for such corporation, acting on it and investing its capital on it, a rule of property. It will be time enough to decide that precise question when that question shall be presented."

Opinion in file No. 17341, now No. 35, p. 669.

Now, turning to the Mississippi Mills case, we find the facts to be that the exemption had been partially repealed, and the controversy was over the right of the legislature to repeal it; and the Supreme Court not only held that all exemptions were repealable, but the actual thing adjudged and determined in that case was that this particular appropriation form was an exemption and had been repealed. That was the point involved. That was the point absolutely necessary to sustain the decree of the court below and was the point actually decided and adjudged. It was not necessary to decide whether the exemption was void or only voidable, because it could be repealed whether void or only voidable. It was only necessary to decide, and that was what was actually adjudged, that that thing, appropriation

or exemption or whatever it was, saint or sinner, had been suppressed, was repealable, and had been repealed.

This decision, rendered in 1878, was the only one that had been rendered when the charter was granted in this case, in 1882, and there was no other tax decision till the case of McCulloch *vs.* Stone, 64 Miss., 378, rendered *at the October term, 1886.*

Now, comparing the two charters and this Mississippi Mills case, it seems to us that it is impossible for opposite counsel to claim that the defendants could have *bona fide* supposed or would have had any color of right to suppose that their "*appropriation*" was not repealable. The utmost they could ask would be that the court would be generous before it was just, and not hold their exemption void because it was made in terms irrepealable, but to disregard that provision as surplusage and hold that it was governed by the Mississippi Mills case and was repealable.

It is not every claim of a violation of the Federal Constitution that will confer jurisdiction on this court. It must be a *bona fide* claim and must be based on color of right; otherwise, as is well said by this court, every case would be brought here where the lower court did not decide to suit the litigant, and it never could decide to suit both litigants.

N. O. *vs.* Wat. Wks. Co., 142 U. S., 87, 88.
Clark *vs.* McDade, 165 U. S., 172.
St. Joseph *vs.* Steele, 167 U. S., 662.
Wilson *vs.* North Carolina, 169 U. S., 595.
Western U. Tel. Co. *vs.* Ann Arbor, 178 U. S., 244.

It may be claimed that the case of Yazoo and Mississippi Valley Railroad Company *vs.* Thomas, 132 U. S., 174, is direct authority for this writ of error, so far as the above point is concerned; but to this contention there are two answers:

1st. This court, on page 184, expressly calls particular attention to the fact that this point could have been made

and was not made in that case, and on page 188 they say it was *conceded* that no tax could be laid on the road after the exemption commenced, and that the only controverted point was when it commenced, whether from the date of the charter or from the completion of the road to the Mississippi river.

2d. This is not a special statute to collect back taxes on railroads alone, as was the case there, but is a general delinquent-tax law, and the delinquency here occurred in 1898, after its passage, in 1892 and 1894, and this court doubted, in Winona *vs.* Minnesota, 159 U. S., 529, whether such a law could be held to be a subsequent law impairing the obligation of contracts, and in the next case, Winona *vs.* Minnesota, 159 U. S., 540, actually dismissed a case like it. Further on this point, see our brief in No. 318, October term, 1899; No. 77, October term, 1900, pages 30–37, where the statutes and decisions are quoted.

Second Point.

"No *res adjudicata* as to the exemption here claimed arose out of the Lambert case."

This at most is merely a construction by the State court of the force and effect of *its own judgments*, and this court has so often decided that this presents no Federal question that it is a useless waste of the phosphates of the brain and an unnecessary stir among its molecules to discuss such a question. Above its fixedness rests the calm and motionless motto, *Requiescat in pace.*

Third Point.

Supposing that this court takes jurisdiction and the patient is received, then the usual and proper course after finding out what the other doctors have diagnosed in him and treated

him for is to exercise an independent examination and judgment as to what is really the matter.

This court is placed in this condition in this case, viz., that the State supreme court has not modified or overruled the judgment of the circuit court, but has *affirmed it*. The circuit court bases the final judgment on certain grounds, *and the Supreme Court does not dissent from nor overrule those grounds*, but affirms this judgment of the circuit court on other grounds. Now, it is perfectly clear that this court has nothing to do with the reasons which induced the Supreme Court to affirm a judgment unless a dissent from them would *reverse* the judgment. This court has very often announced and applied this principle. In one line of decisions it has uniformly held that where the judgment of the lower court is based on two or more grounds, one of which is non-Federal, they cannot pass on the one or ones which are Federal because their decision one way or the other would be a mere essay, in that it would not *reverse* the judgment, and hence could accomplish nothing. In the case at bar this court, in order to *reverse* the judgment, would necessarily be obliged to overrule both the State supreme court and the circuit court. There is no escape from it or way around it. It will not do to say that you have jurisdiction of questions only which are decided by the highest court of the State, for this is tantamount to saying that you have no jurisdiction at all in this case, as it is an undoubted fact that this judgment of the circuit court, *as affirmed by the Supreme Court*, now rests on a double basis, those grounds given by the supreme court added to those decided by the circuit court, and no amount of sophistry or argument can eliminate this existing and essential fact, and it necessarily follows that in order to reverse *the judgment* you will be forced not only to take out the additional foundations placed under it by the supreme court, but also the original foundations built in the circuit court. It is not exactly a case where, when you have once taken jurisdiction, other questions non-Federal press for preference

as of first impression, but more properly a case where you are called on to reverse a judgment resting on several grounds *already decided*, some by the supreme court and some by the circuit court, and none of them overruled or modified, and in this view of it we think the position above intimated is the correct one—that you have no jurisdiction at all, the judgment resting on several grounds, some of which at least are non-Federal. But if you take jurisdiction, then what? The rule is well established in this court that you will not decide on the merits of a Federal question, although it may possess sufficient color to confer jurisdiction, if there is any other question non-Federal which is decisive of the case and which is properly before you. This is illustrated in a case where The Yazoo and Mississippi Valley Railroad Company was plaintiff in error in case of that style, plaintiff, *vs.* Thomas, 132 U. S., 174, where this court takes jurisdiction because a Federal question might be involved under one construction of the charter, and then decides against this construction, thus deciding on a question non-Federal, and your reports are filled with illustrations, but the principle itself is announced as the fixed rule of this court in Baker *vs.* Grice, 169 U. S., 291, 292.

Then if you take jurisdiction on the ground that the decision that the exemption or appropriation did not pass into the consolidation raises a Federal question, under the rule above mentioned, your next inquiry is, Is there now any other question on which this case can be disposed of, and is it necessary to decide this Federal question? In other words, can the decision of the court below be sustained on other grounds non-Federal in their nature, for, if so, it must be admitted that the constitutional provision that no State shall pass any law impairing the obligation of a contract has not been infringed.

This brings up the question, Was the decision of the circuit court in sustaining the fifth and sixth replications of *res adjudicata* correct? We think this decision is conclusive

on this court; but suppose you are at liberty to rectify the mistake of the supreme court and to decide for it what it ought to have decided, and also to decide it in the way it ought to have been decided.

There are two legal rules which here met in conflict, and the circuit court gave precedence to one and did not decide the other, while the supreme court gave precedence to the other and did not decide the one.

One is that a demurrer attaches to the first substantial defect in the pleadings, and, if interposed to a replication, should be extended back and sustained to the plea if the plea is bad, as was done by the supreme court here.

Miles *vs.* Myers, 1 Miss. (Walker), 379.
Wrenn *vs.* Spann, 3 Miss. (1 How.), 115.
Tucker *vs.* Hart, 23 Miss., 548.

But there is another rule that when once a question has been put in issue and litigated between two parties and decided it cannot be again opened up and relitigated between them, and this rule is not only founded in justice, but in a sound public policy, that it is to the interest of the Republic that there should be some end to litigation, and being thus grounded in public policy, it is not only natural, but eminently proper, that it should be favored and applied in all proper cases. It is entitled to precedence and is favored in law.

Marsh *vs.* Pier, 4 Rawle, Pa., 288.

And the supreme court was clearly in error in extending the demurrers back to the pleas and holding that it was unnecessary to decide on those replications. This is demonstrable. Suppose I sue on a deed of doubtful validity and the supreme court holds that it is void for uncertainty, and then I immediately sue on it again, is my antagonist to be held to demur to the declaration again and take the chances of the supreme court changing its mind, as it sometimes does,

or is it not his duty, instead of demurring, to plead the former decision, and if he does plead the former decision, is the court to extend the demurrer to his plea back to the declaration? Where the defense of *res adjudicata* intervenes it is clearly an exception to the rule that a demurrer should be extended back to the first fatal defect, for the first fatal defect may be one which the supreme court has already passed on, and the very object of the defense of *res adjudicata* is to move the previous question and close the discussion; hence the decision of the supreme court that it was unnecessary to pass on these replications was erroneous; but it sustains the judgment on other grounds and does not overrule the replications. In fact, the concluding sentence of the opinion is: "The judgment, however arrived at, was right and must be affirmed."

Record, p. 232.

From which we think this court has no jurisdiction, because the defense of *res adjudicata* is not a Federal defense, and if this court should differ with the supreme court as to the additional grounds added by it, the judgment would still rest on the decision of the circuit court on these fifth and sixth replications.

But suppose this court can review the decision of the circuit court, then what?

The fifth replication at length and technically pleads the decisions of the State supreme court of June 20, 1898, and February 20, 1899, in the main case as *res adjudicata*, and there can be no doubt whatever that they are *res adjudicata* under the well-settled decisions of this and other courts. It is the same property, same parties, same alleged exemption, and same identical questions, except that that case was for the taxes of 1892–1897, and this is for the taxes of 1898.

New Orleans *vs.* Citizens' Bank, 167 U. S., 389–401.

See our brief in No. 320 of the October term, 1899, pp. 30–32.

Werlien *vs.* New Orleans, 177 U. S., 396, 397.

This is the only difference shown by the plea and the replication; but we admit that under the statutory practice in Mississippi there appears what is or may be another difference. Section 677 of the Code of 1892 provides that any writing filed with a pleading shall be considered a part of it for all the purposes of the action, and it is the practice in deciding a demurrer to a pleading to consider both the pleading and exhibit to it. We also admit that there was made and filed a written agreement that all exhibits to the pleadings should be considered on demurrers to them.

Record, p. 198.

And on this provision of the Code and under this agreement the entire record of this former suit is now before this court and can be looked to in considering the sufficiency of this replication. That record shows that we contend that no Federal question was raised or passed on in that suit, while opposite counsel contend to the contrary. If they are right, then most assuredly that suit is *res adjudicata* when pleaded in this (Blythe *vs.* Hinckley, 173 U. S., 507, 508). But if we are right and no Federal question was decided in that suit, then our replication now presents the further point as to whether, if a party neglects to raise a Federal question in one suit, he can raise it in any suit on a different cause of action, but depending on the same identical questions; and here it is not necessary to concern ourselves with the bald question when properly presented, as if, for instance, the court had held in the former case that the exemption had been expressly repealed by a subsequent statute, and then in a suit for taxes of a subsequent year the defendants had set up that such repeal impaired the obligation of their contract. Here we are met at the threshold by another principle. This court has held that where a contract is claimed to be impaired by a subsequent statute it will not be bound by the decision of the lower court as to whether there was a contract to be impaired, but will examine for

itself; and here is where the difficulty for the defendants comes in, for if the lower court on a former trial has given a particular construction or finding, that construction or finding is *res adjudicata*, and this court would then be limited to a consideration of the question as to whether that contract, *with that construction*, was violated by the subsequent law, or, rather, whether the decision of the court in the later case in holding that the construction was *res adjudicata* violated the Federal Constitution.

In the case at bar the replication, which was fully sustained by the opinion of the court, pleaded that certain things were properly in issue and were actually decided in the former suit, and these things were:

1st. That the exemption and appropriation was unconstitutional and void under the constitution of December 1, 1869.

2d. That it was prevented from passing into said consolidation of October 24, 1892, by the constitution of 1890.

3d. That it was lost in and by the said consolidation of October 24, 1892.

4th. That said consolidation of October 24, 1892, formed a new company.

5th. That said exemption was repealed by the laws of 1886 and 1890 and the Code of 1892.

Record, p. 182.

Now, there might be some plausibility that the above second and fifth findings standing alone would not prevent a defense that the State constitution of 1890 and laws of 1886, of 1890, and Code of 1892 with that construction, even though that construction was *res adjudicata*, violated the contract clause of the Federal Constitution if the further question as to whether it did violate said contract clause was not

raised or decided in the former suit so as to become itself *res adjudicata*, the rule being that in a subsequent suit in a different cause of action the principle of *res adjudicata* only extends to such issues as were made and actually decided in a former suit; but no such plausibility exists as to the first, third, and fourth findings; for if they are *res adjudicata* in the second suit, that ends the controversy and leaves nothing for this court to pass on, as it is perfectly evident that they do not depend on any *subsequent* law or constitution nor the construction of any of either.

Blythe *vs.* Hinckley, 173 U. S., 507, 508.

See also our brief in No. 320, October term, 1899, pp. 32–34.

As we have before said, under the first finding, if a *subsequent* law was involved it might be that this court as a preliminary matter would exercise its independent judgment to ascertain whether there was a contract to be violated or whether it was unconstitutional as claimed when that question came before it *de novo* in an original suit (though we deny this where *a prior constitution* is involved on the ground that the State court has a right to construe its own State constitution unconnected with any subsequent law); but where the State court decides that a contract is unconstitutional and void in one suit and the same contract is set up in a subsequent suit a very different question arises. If the State court then holds that the question is *res adjudicata*, the only question before this court is not whether the contract is unconstitutional, but whether the former decision is *res adjudicata*.

And so if the third and fourth findings are *res adjudicata*, then the third follows as a necessary corollary of the fourth on general principles of law, and no subsequent law or Federal question enters as an ingredient into the discussion. It is always and everywhere held that an exemption does not pass into a consolidation the effect of which is to form a *new*

company, and that the consolidation did form a *new company*, and that hence the exemption did not pass into it as *res adjudicata* and not open to be relitigated in this court, for this court as a matter of uniformity, as well as of sound international law, follows the constitutional mandate that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," and that each State shall give to the judgments of a sister State the same faith and credit which are given to them by the courts of the State in which they are rendered.

There is no doubt, then, that whether this court considers itself bound by the judgment of the circuit court in holding these things *res adjudicata* or exercises its own independent judgment as to whether they are in fact *res adjudicata* under its own rules of decision, in either case there is no escape from the position *that they are res adjudicata.*

See numerous authorities cited in our brief in No 320 of October term, 1899, No. 79 of this October term, 1900, on pages 30–32, and the late case of Werlien *vs.* New Orleans, 177 U. S., 396, 397.

After the demurrer of the defendants to this fifth replication was overruled they filed two rejoinders to it, one setting up the writ of error from this court in the main case, now pending here as file No. 17341, as No. 756 of the October term, 1898, as No. 244 of the October term, 1899, and as No. 35 of this present term, 1900, and the other setting up the Lambert case as *res adjudicata*, and the action of the court in the main case in overruling it as violative of the contract clause and fourteenth amendment to the Constitution of the United States.

Record, pp. 192 and 196.

The defendants also filed a third plea setting up the Lambert case as *res adjudicata*, which the plaintiff counter-pleaded with a replication setting up the main case as *res adjudicata*

and the later decision, and that as to the Lambert case neither the parties nor the property were the same. After a demurrer to this replication was overruled they also filed a rejoinder to it, setting up the pendency of the writ of error here in the main case. A demurrer to these rejoinders being sustained, the defendants declined to plead further and judgment *nil dicit* was entered against them.

Record, pp. 34, 191, 196, 222, 223.

We will consider the Lambert case under the head of the "fifth point" in this brief, and will now confine ourselves to the question of the pendency of the writ of error here in the main case as a bar to pleading the main case as *res adjudicata* in this case.

We think it is settled by the great weight of authority both in this court and in the courts of last resort of the several States that the pendency of a writ of error either with or without supersedeas is no bar to a plea of *res adjudicata*, and such is the doctrine of the common law, by which we presume this court will be guided as to its own writs of error.

Kansas City, &c., R. R. Co. *vs.* Twombly, 100 U. S., 81.

Oregonian, &c., *vs.* Oregon, 27 Fed. R., 277, 284.

Scott *vs.* Pilkinson, 110 Eng. Com. L., 11.

Same case, 2 Best & S., 41, and a multitude of authorities cited in our brief in No. 320 of October term, 1899, on pages 28–30.

Some authorities to the contrary are cited in the brief of opposite counsel in No. 318 of October term, 1899, on pages 12–15, but none of them from this court except some admiralty cases and the case of Hubbell *vs.* United States, 171 U. S., 203, 210, which we cite against them.

In that brief, on page 14, they make the point that where a plea of *res adjudicata* is interposed pending a writ of error in the main case, that while, as a matter of strict right, it is not superseded by the writ of error, but that the better practice

is to suspend execution in the second case until the writ of error has been disposed of, because *non constat*, but that the first case may be reversed. There is no such difficulty here, for this court is, or at least is claimed to be, the court of last resort in both cases, and this court can regulate the matter exactly as suggested by opposite counsel—that is, to suspend its decision in this case until the other, now No. 35 of the October term, 1900, is decided, and then decide this one accordingly. If the main case is reversed, then reverse this one, but if the main case is either affirmed or dismissed for want of jurisdiction, then either affirm or dismiss this one for want of jurisdiction, for it makes no difference whether the former case is affirmed or the writ of error is dismissed, in either case the judgment of the State supreme court is a finality and stands in full force and affirmed, and is as much *res adjudicata* in the one case as in the other.

The sixth replication to the second plea of the defendants pleads the decision of the railroad commission in making the assessment as *res adjudicata*, the six months allowed by statute, Code of 1892, section 90, having expired, and none having been taken. The demurrer of the defendants to this replication was overruled, and they then filed two rejoinders, one of *nul tiel record*, and the other was really not a rejoinder, but a conclusion of law that the railroad commission had no jurisdiction to render a conclusive adjudication, and if they did it would violate the contract clause and the fourteenth amendment to the United States Constitution. The plea of *nul tiel record* was filed because the replication alleged that the assessment was made after objections, and the contention of the defendants was that they never objected to the assessment, but they thought an assessment was necessary in order that they might tender the affidavits and get the receipts required by the charter, and, in order that the difference between us might be determined as one of law and not of fact, it was agreed that the record of the railroad commission might be considered both as a part of the repli-

cation and of their rejoinder on the argument of the demurrer, and in making up the supreme court record it was agreed that the record of the railroad commission need not be copied, but that "the only objections made are those appearing in the copy of the assessment-rolls on file in this case, and that said railroad assessors did not in any way pass on the same further than may be implied in simply making out the assessment, as in case of all other railroads where no objections were filed."

Record, pp. 198 and 226.

The point we make is that this is a suit on *the same cause of action*—for the taxes of 1898—and that it is immaterial really whether any objections were made and passed on or not, but that the decision and assessment of the railroad commission is *res adjudicata* not only as to everything that was decided, but also as to everything that might have been put in issue and decided, and that if the commission failed to pass on any issue or decided any objection erroneously the remedy was by certiorari under Code of 1892, section 90, and that the decision could not be attacked collaterally: and, further, that as section 3875 of the said Code provided that any railroad claiming an exemption from taxation should state the claim separately and cite the law under which it was made, and that as section 3877 only required the commission to assess "all railroads liable to taxation," it was clear that the two sections, when construed together, only required the commission to assess such railroads as were liable to taxation, and in order to do this, with the claim of exemption before them, it necessarily devolved on them as a duty to determine whether the railroad was liable to taxation, and that being so their decision, when made, was not ministerial, but *judicial*, and could not be attacked collaterally; that there was no scheme provided for assessing any railroad not liable to taxation, and that, taken in connection with the mandate in section 112 of the constitution of 1890,

that when any assessment was made no county should be denied the right to levy taxes on it, evinced a clear intention that no railroad should be assessed which was not liable to taxation, which position was fortified and made impregnable by the subsequent sections 3880 to 3884 of said Code, that the assessment-rolls should be sent down to the counties, and that the tax collectors were required to collect the taxes on them "*in all respects*" as they collect other taxes, and they were required to collect other State and county taxes *in money* and not in affidavits.

See sections 3801 and 3803.

Our contention was and is that what claim to the exemption the railroad had was required to be made to the railroad commission and not to the sheriffs, and that in this case the claim that they had applied and paid the taxes on the construction debts and had not been able to pay the 8 per cent. dividend should have been made to the railroad commission, as part of their claim to exemption required under section 3875 and as these were questions of fact the railroad commission had a right to inquire into their truthfulness, which necessarily made it a judicial question, and their finding against the defendants or failure to find at all were mere errors of law or fact which could be corrected and could only be corrected by certiorari.

In a suit against this same railroad for the back taxes from 1886–1891, inclusive, the State supreme court held that the decision of the railroad commission was *res adjudicata*. It is true that in that case the court laid some stress on the fact that it was for back taxes, and that the act of 1894 required a positive written notice to the railroad company affected.

See opinion in No. 9358 (from 25 Southern R.), filed in Nos. 319 and 318, October term, 1899, here.

But we call the attention of this court to the fact that in both that and this case the mode and manner of assessment

and the assessment itself are made in exactly the same way and under the same sections, 3875–3884 of the Code of 1892, the act of 1894 requiring the assessment to be "in the same manner required by law."

Laws of 1894, § 4, p. 30.

There is no distinction except that in the one case a written notice is required to be given of the time and place, while in the other it is given by statute, and the reason for this is obvious. In the one case, as the revenue agent is to commence proceedings after the fiscal year has expired and whenever he discovers that property has escaped taxation by reason of not having been assessed, it is clear that it is essential that the railroad company should have notice, but in the other case the time and place are fixed by statute, and, as this court remarks, no personal notice is necessary if the railroad companies have notice by statute that the railroad commission will meet at a certain time and place and assess their railroad in common with all others, unless they appear and show cause why it should not be done, and they did appear here.

Pittsburgh *vs.* Backus, 154 U. S., 425, 426.
Winona *vs.* Minnesota, 159 U. S., 536, 537, 538.
Fallbrook *vs.* Bradley, 164 U. S., 157, 158, 170–175.
Adams Ex. Co. *vs.* Ohio, 165 U. S., 227.
Weyerhauser *vs.* Minnesota, 176 U. S., 550.

Fourth Point.

If this court takes jurisdiction and feels obliged to decide the point as to whether there was a new company formed by the consolidation of October 24, 1892, and as to whether the effect of section 180 of the constitution of 1890 in cutting off the exemption, as held in one of the findings of the State supreme court, was violative of the contract clause or the fourteenth amendment to the Constitution of the United States, then we cannot do better than to agree with the

supreme court that as to that "we are content with the reasoning of the opinion in the main case," which is now No. 35 of the October term, 1900, No. 244 of the October term, 1899, and No. 756 of the October term, 1898, and the reasoning of the opinion in the main case is found in that record on pages 638–656.

And in this connection we would call the attention of this court to the fact that the main case was decided on June 20, 1898, and this suit is for the taxes which accrued on December 15, 1898, under section 3801 of the Code of 1892, and that hence there is no question in this case of giving the decision a retroactive effect, as indeed there was really not in the main case as claimed, for those suits were each and all for current and not back taxes, properly speaking.

Fifth Point.

Is the decision that "no *res adjudicata* as to the exemption here claimed arose out of the Lambert case" correct? The court says: "As to this * * * we are content with the reasoning of the opinion in the main case."

Turning now to the opinion in the main case, file No. 17341, No. 756 of the October term, 1898, pages 656–659, we find that the opinion gives as the reasons that the parties and property and taxes and charters were all different (p. 656), and that the exemption was not pleaded or offered in evidence in the latter case, the court on this point remarking: "It is also true that to claim the benefit of *res adjudicata* as an estoppel, in the strict and technical sense, it must be pleaded or offered in evidence" (p. 656), and this is in accordance with the decisions of this and all other courts.

United States *vs.* Bliss, 172 U. S., 321, 326.

See also many authorities cited in our main brief in the above case, No. 244 of the October term, 1899, p. 40.

Bryan *vs.* Campbell, 177 U. S., 649, 653–655.

And if the former judgment is not pleaded or offered in evidence in the later case, it, like every other defense which could have been and was not availed of, is itself overruled and concluded by the later judgment.

Freeman on Judgments, § 332.
Marsh *vs.* Mandeville, 28 Miss., 122, 128.
Conley *vs.* Brayton, 16 Iowa, 10, 18.
Bateman *vs.* Grand Rapids, &c., 96 Mich., 441.

And the other reasons given by the supreme court that it was a different railroad and different charter are in accordance with the decisions of this court.

Wilmington *vs.* Alsbrook, 146 U. S., 301, 302.
New Orleans *vs.* Citizens' Bank, 167 U. S., 397.
Southwestern R. R. Co. *vs.* Wright, 116 U. S., 231, 236.
Chicago, &c., *vs.* McGuffey, 120 U. S., 569.

And the facts that it was a different railroad and different charter and that it was not pleaded or offered in evidence in the main case appear from an inspection of the record in the main case, which is made part of the replications, and from the opinion of the court, *supra*, and from the positive statements in the replication to the third plea in this case.

So it is plain that the Lambert case could not be used as *res adjudicata* in this case, but that the decision in the main case was *res adjudicata*, and also the decision of the railroad commission in making the assessment; that the pendency of the writ of error was no defense against the main case and had nothing to do with the decision of the railroad commission; that certainly none of these things involve any Federal question, and are decisive of the case, and we ask this court to dismiss the writ of error; and even if this court should follow the State supreme court and extend the demurrer back to the pleas, we still contend that the decision that the exemption, if it ever existed, did not pass to the consolidated company, based as it was on the reasons given in

the main opinion, did not raise any Federal question, and we would still ask this court to dismiss the writ of error, but if the court should disagree with us in all these contentions, then we ask it to decide that the judgment of the lower court was right and to affirm it.

We have not noticed or commented on the certificate of the chief justice, not because it is against us, for the *more decisions* there can be crowded into the case the safer and better for us, as one non-Federal ground is sufficient for us, but because we know of no law requiring such certificates, and no way to enforce the giving of one if required. It seems to have been a custom grown up to certify the grounds of decision where no opinion was delivered nor reasons given in the record, and where even the opinion was at first held to be no part of the record, as in 12 Wheat., 117, and 24 How., 413, in order to prevent a failure of justice and to put this court in possession of the grounds on which the judgment was rendered, but now, when the opinion is a part of the record and required by the rules of this court to be sent up as such and is required by the State statute to be in writing, we think a certificate is unnecessary, for the written opinion is the official utterance of the court and the ultimate and final one on which it has decided to base the judgment, and any verbal agreements which the members of the court have had in the consultation-room are merely the opinions of the members in the aggregate and not the official utterance of the court, and, as this court has often held, cannot change or alter the opinion or the record.

Code of 1892, § 4352.

Henkel *vs.* Cincinnati, 177 U. S., 170, 171.

The opinions of the supreme court of Louisiana, being by the law of that State a part of the record, were also treated as such by this court, and the same rule was extended to other States as statutes were passed, like those of Mississippi, requiring the opinions to be in writing.

Gross *vs.* Mortgage Co., 108 U. S., 485, 486.

A statute like section 4352, *supra*, makes the opinion a part of the record.

Lawrence *vs.* Stearns, 79 Fed. R., 878.
Stearns *vs.* Lawrence, 83 Fed. R., 738.

A Federal question cannot be originated by the certificate of the chief justice, as has been held ever since.

Felix *vs.* Scharnweber, 125 U. S., 54.

The custom of giving this certificate has become so common that the chief justices seem now to feel a delicacy in refusing one, as if such a course might be considered in some sort a breach of official etiquette, but it must be remembered that these certificates are generally *ex parte* and written out by the counsel for the plaintiff in error, and that the defendant in error is entitled to some rights, and hence, even where the certificate is admissible, it should state that the grounds certified *are all the grounds on which the judgment was based*, and where there is a written opinion giving the grounds of the decision we think the certificate should be held to be inadmissible, because it cannot contradict the record or the official opinion, and its only effect is to create confusion and lead to unnecessary arguments and contentions before this court.

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